CHANCERY BAR

Tax Update for Trusts

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Introduction

- Topics
- FA 2014
  - Follower notices
  - Accelerated payments
  - Appeals: substantive and JR
  - ECHR
- *Fisher v HMRC* [2014] UKFTT 804
- HMRC's announcement 4/8/14: use of foreign income/gains

FA 2014 – Follower Notices (FN) and Accelerated Payments (AP)

- Measures introduced in FA 2014 Part 4 as part of the programme to raise the stakes on tax avoidance
- FN rules "*designed to improve the rate at which tax avoidance cases are resolved where the point at issue has, in HMRC's view, already been decided in another taxpayer's case*"
- Taxpayer's who are "followers" have to make a clear choice between settling their issue with HMRC or risking a penalty
- AP rules require recipients FN pay tax to litigate
- AP also apply to DOTAS or counteraction GAAR arrangements

FA 2014 – when a FN can be given

- 4 conditions A to D need to be met
- A – a tax enquiry is in progress or an appeal is on foot but has not been determined or abandoned or disposed of
- B – the return claim or appeal is on the basis that a particular tax advantage result from "*tax arrangements*"
- C – HMRC is of the opinion there is a judicial ruling relevant to the chosen arrangements (they have considered the arrangements, it would deny the advantage and is final ruling)
- D – no previous FN given same person same advantage ruling

FA 2014 – what the taxpayer can do

- Can disagree in writing to HMRC on limited grounds:
  - Condition A, B or D not met
  - Judicial ruling not one relevant to the arrangements
  - FN not given within the time limit (broadly 12 months of later of the judicial ruling, day return or claim made or day tax appeal made)
- Representation must be made within 90 days FN given – review by another HMRC office
- NO appeal to the Tribunal against a FN
- Corrective action within 90 days – amend return/settle/ notify

FA 2014 – FN the consequences

- Penalties – if corrective action not taken, taxpayer liable to a penalty once tax assessed
- Minimum penalty (with the full availability of mitigation before assessment with later counteraction) is 10%, maximum 50%
- Penalty due 30 days after notification
- Can appeal against the penalty, interest due
- Special rules for partnerships

FA 2014 – Accelerated Payment Notice

- To remove the cash flow advantage of postponement
- Conditions – APN can be issued to taxpayers who:
  - Have received a FN
  - Used a DOTAS notifiable arrangement, or
  - Subject to a GAAR counterclaim
- And
  - Enquiry in progress into return or claim or appeal on foot
  - Return or claim or appeal on basis particular tax advantage results

FA 2014 – APN what the taxpayer can do

- Object by representations in writing to HMRC within 90 days
- Grounds must be
  - Conditions not met
  - Amount in notice inaccurate
- No right of appeal
- Penalties for unpaid APN – 5% tax on penalty day, 5 months 5%, 11 months 5% - right of appeal

FA 2014 – wider challenges?

- Can pursue a substantive appeal after a FN or APN, needs careful consideration and advice
- Can appeal penalties in the usual manner
- Consider application to the Administrative Court by way of judicial review – note strict timetable – application for permission within three months of decision, once permission granted, detailed grounds within 35 days
- Article 6 ECHR – imposition of a 50% penalty for failure to follow FN and continue appeal go to root right fair hearing?

Fisher v HMRC – the facts

- Stan James betting business – owned by Fisher family
- Incorporated as Stan James (Abingdon) 1986 – SJA
- By 1988 shares held by Stephen, Anne, their son Peter and their daughter Diane.
- Business originally betting shops, and supplying odds to independent bookmakers
- By 1990's advent sky sports etc telebetting included
- 1992 SJA centralized telebetting business – increasingly important
- By 1999 telebetting accounted for major part business – teletext was very important

Fisher v HMRC – the facts

- Betting duty on each bet charged was 9% (UK duty 6.75%, horse race levy 1%, grossed up and to a whole number)
- Legally possible for a bet to be placed overseas (e.g. in Gibraltar) – no UK duty
- Betting regime prohibited advertising UK or if resources were shared with an entity in the UK in order to take the bet – criminal matter
- 1997 SJA set up a branch in Gibraltar take overseas bets
- March 1999 Victor Chandler (a main competitor) moved entire betting business to Gibraltar + in July 1999 they obtained High Court decision that advertising Gibraltar business in UK by teletext was legal

Fisher v HMRC – the facts

- By August 1999 Ladbrokes, William Hill and Corals announced intention to move telebetting overseas
- Stephen told HMRC summer 1999 that branch begin taking UK bets
- 1999 SJG was incorporated Gibraltar – shares held by Stephen, Anne, Peter and Dianne
- Early 2000 Advice taken QC on betting law and from Kevin Prosser QC and KPMG tax consequences moving betting business to Gibraltar
- Advice was that the company SJG should carry on the telebetting business
- Share capital SJG increased: Peter and Dianne held 24% each and Stephen and Anne 26% each – separate classes of shares but with equal rights

Fisher v HMRC – the facts

- Telebetting business was valued at £500,000
- February 2000 CA overturned Chandler: use of teletext to promote betting overseas prohibited
- 29 February 2000 telebetting and other business (not shops) transferred (TAA); Substantial business set up in Gibraltar
- From 2003 internet betting and gambling platforms set up
- December 2008 Anne and Stephen sold shares in SJG to Peter and Dianne
- February 2009 SJG became Plc
- Anne and Stephen all relevant times UK resident but Anne Irish national
- Dianne ceased be UK resident in February 2000 and Peter in July 2004

Fisher v HMRC – the issues

3 broad strands to the issues before FtT

- Interpretation of TAA code
- Whether treaty rights of freedom of establishment and free movement of capital were engaged, how TAA legislation read in the light of such engagement, the effect on Gibraltar
- Validity of assessments certain years

Fisher v HMRC – TAA questions

- Whether section 739 (now 720 ITA) requires there to have been actual avoidance of income tax before it is engaged
- Is it possible for TAA to apply to situations where there are multiple shareholders of the transferor company
- Whether it is possible to apply the provision to the context of a trading company whose business evolves into distinct areas from the business transferred
- Whether the motive defence applies because no tax avoidance purpose as purpose was to save the business

Fisher v HMRC – the Ft-T answers

- No requirement of income tax avoidance for application TAA provisions (note contrary to their own guidance)
- Can apply to multiple transferors – section 744 which allows apportionment overruled Pratt (motive defence problem?)
- Can apply where business evolves to distinct area: "*by virtue or in consequence*" narrow; AO limited to new income/power to enjoy, but on facts income fruit of the telesales tree
- Motive defence subjective; distinguished *Brebner*: narrow test: purpose to specifically avoid tax; betting duty avoidance

Fisher v HMRC – other issues

- Compatibility of TOAA provisions: Anne's Irish nationality gave European law rights of establishment/capital in Gibraltar
- UK AA legislation applied to restrict those rights, without justification, and was not proportionate
- Applying conforming interpretation to UK legislation: scope of the motive defence widened, lower BD not avoidance
- Gibraltar issue: EU freedoms do not apply between UK and Gibraltar – situation wholly internal to the member state.
- Declined reference to EU. Defective assessment issues

HMRC's announcement on 4 August 2014

- Foreign domiciliaries are subject to a favourable regime of taxation. Broadly taxable on foreign income and chargeable gains only on remittance to the UK
- Includes where income or gains are "*used*" in the UK
- Suppose foreign income and/or gains are charged as security for a debt. The borrowings are brought to the UK – often to purchase a UK property
- Until 14 August 2014 HMRC said RDRM: security was not "*used*" if the debt serviced and repaid on commercial terms

HMRC's announcement on 4 August 2014

- RDRM amended, HMRC now consider "*The foreign income and gains used as collateral are used 'in respect of' the relevant debt, so there is a taxable remittance when the loan is brought to the UK*".
- Only where foreign income or gains offered as collateral for a relevant debt, whether to a UK-based or offshore lender.
- HMRC recognised that in many cases UK property or non-taxable offshore property is offered as collateral in respect of a relevant debt: then no remittance.

HMRC's announcement on 4 August 2014

- RDRM recognises if foreign income or gains used to pay interest or repay debt: double taxation
- HMRC stated that their view of the law is unchanged and that the previous treatment was concessionary – now withdrawn
- Note that HMRC have indicated they received internal advice that previous treatment *ultra vires*
- HMRC are of course entitled to change their view of the law but position as to past contentious

HMRC's announcement 4 August 2014: existing arrangements

- You should notify full details to HMRC if you have used foreign income or gains as collateral for a loan and have not declared a remittance. HMRC will take no action to assess those remittances if the loan arrangements were within the terms of the concession in RDRM33170, provided:
  - you give a written undertaking (which is subsequently honoured) by 31 December 2015 that the foreign income or gains security either has been, or will be replaced by non-foreign income or gains security before 5 April 2016, or

HMRC's announcement 4 August 2014: existing arrangements

- the loan or part of the loan that was remitted to the UK either has been, or will be repaid before 5 April 2016

- The notification should include the amount of foreign income or gains used as collateral and the amount of the loan remitted to the UK (if not the full amount).
- Notifications should be sent to: HMRC, PTI Risk Team SO708, Room 220, PO Box 203, Bootle, L69 9AP

HMRC's announcement 4 August 2014: existing arrangements

- HMRC will assess remittances in any of the following circumstances:
  - the notification indicates that the conditions will not be met
  - the notification is not in fact met
  - it is discovered no notification was made and arrangements are not unwound within the specified period

HMRC's announcement 4 August 2014: existing arrangements

- Outstanding questions: is this retrospective; is 20 months enough; will grandfathering provisions be introduced; interaction with business income relief
- Can HMRC reopen closed years?
- Whether discovery rules engaged: would prevailing practice exemption apply to prevent an assessment on grounds tax return not careless: HMRC say no
- Further guidance: probably FAQ's

HMRC's announcement 4 August 2014: what to do now

- Pre-existing arrangements: deadline under transitional statement 31 December 2015: wait and see
- New arrangements: can you just borrow on the security of the house as no remittance?
- Borrowing without security – practical questions – will bank lend unsecured, new lending requirements
- What if bank needs more security – primary charge on UK property, secondary charge on foreign income/gains, limit amount borrowed to UK property?

HMRC's announcement 4 August 2014: what to do now

- In offshore trust structure - what about borrowing from the trust instead of the bank?
- If loan is interest free/on favourable terms:
  - Consider CGT capital payment issues and TAA issues
  - Consider trust law issues (is FD a beneficiary?)
- Trust has UK situate asset (the benefit of the debt) - unless the debt is a specialty outside the UK.
- Is debt still be deductible for IHT purposes?

Finally…

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